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October 16, 1975

The Honorable Tom Creighton
Chairman, Senate Committee on Economic
Development
Senate Chambers, Capitol Building
Austin, Texas 78711

Opinion No. H- 720

Re: Constitutionality of article
1.07, Taxation-General.

Dear Senator Creighton:

You have requested our opinion concerning the constitutionality of article 1.07, Taxation-General, which establishes a state tax lien and provides:

(1)(f)(ii) No bank or savings and loan institution shall be required to recognize the claim of the State to any deposit or withhold payment of any deposit to the depositor or to his order unless and until it is served by the Comptroller with notice of the State's claim.

In our view article 1.07 contemplates that upon proper notice a bank will withhold payment of deposits in the sum of the lien. You ask whether such freezing of a person's deposits on the basis of an administrative decision by the Comptroller is constitutional. You have referred us to Fuentes v. Shevin, 407 U.S. 67 (1972) and Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). Sniadach involved a Wisconsin wage garnishment statute which allowed private creditors to garnish a defendant's wages without a prior hearing. In ruling the statute unconstitutional the Court indicated that such summary procedures would meet the requirements of due process only in "extraordinary circumstances" 395 U.S. at 339.

These extraordinary situations were more fully discussed in Fuentes, a case which involved the summary seizure, without prior notice or hearing, of household goods under a writ of replevin issued by the State on application of a private creditor. In holding the statute before it unconstitutional the Court stated:

. . . Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has

been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food. 407 U. S. at 90-92.

Regarding the collection of internal revenue, the Court cited Phillips v. Commissioner, 283 U.S. 589 (1931), in which summary administrative proceedings were upheld. The Court stated:

Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process if the opportunity given for ultimate judicial determination of liability is adequate. 283 U.S. at 596-597.

This language was quoted and Phillips cited without criticism in Mitchell v. W. T. Grant Co., 416 U.S. 600, at 611 (1973).

In Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1973), the Court upheld the summary seizure of a boat upon which contraband had been discovered, stating:

. . . unlike the situation in Fuentes, [the] seizure is not initiated by self interested private parties; rather [government] officials determine whether seizure is appropriate under the provisions of the . . . statutes. 416 U.S. at 679

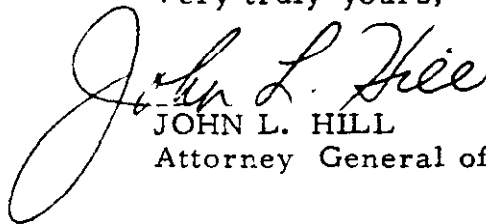
We believe our courts probably would hold that article 1.07 (1)(f)(ii) satisfies the criteria presented in Phillips and Calero-Toledo. The State has an important governmental interest in securing revenues, the seizure is initiated by a responsible

government official under specific statutory authority and the taxpayer has opportunity to bring any dispute before the courts. Taxation-General, articles 1.032(c), 1.05, 1.07B. Accordingly, in our opinion article 1.07 probably would be held constitutional under the present case law.

SUMMARY

Article 1.07, Taxation-General authorizing a state tax lien is constitutional.

Very truly yours,



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Attorney General of Texas

APPROVED:



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C. ROBERT HEATH, Chairman
Opinion Committee

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